SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 135

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ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE U. WILDER, EXECUTRIX,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE.

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## BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

We take the liberty of making the following suggestions in support of the petition for writ of certiorari in the present case:

### Opinion of the Court Below.

The opinion of the court below was rendered on March 20, 1941, by the Circuit Court of Appeals for the Fifth Circuit on the appeal of respondent to that court. The opinion of the court may be found in 118 F. (2d) 281. It appears at pages 51 to 54 of the Record.

## Jurisdiction.

The jurisdiction of this Court in the present case is stated in the accompanying petition for certiorari.

## Statement of the Case.

We adopt as a statement of the present case the summary of matters involved and reasons relied on for the issuance of the writ of certiorari appearing in the accompanying petition for writ of certiorari.

## Specification of Error.

The lower court erred in holding that there should be included in the taxable estate of the decedent, for estate tax purposes, one-half of the value of the annuity contracts purchased by the decedent from an insurance company with funds of the community, the decedent receiving the annuity for his life and the surviving spouse for her life.

## Statutes Involved.

The statutes involved are the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by H-J Resolution 529 of March 3, 1931, c. 454, 46 Stat. 1516, as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real, or personal, tangible or intangible, wherever situated——
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> * * * * * * *
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> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before

his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

## ARGUMENT.

It is now respectfully urged:

No liability for estate taxes may be based upon the annuity contracts, because at the death of the decedent nothing passed from the dead to the living. The contracts in question are not within the scope of H-J Resolution 529, March 3, 1931.

As the decedent did not possess at the time of his death any of the incidents of ownership of the annuity contracts, they are not includable in computing his taxable estate for estate tax purposes.

These, in the order in which they have been stated:

**No liability for estate taxes may be based upon the annuity contracts, because at the death of the decedent nothing passed from the dead to the living. The contracts in question are not within the scope of H-J Resolution 529, March 3, 1931.**

The relation of husband and wife in community property States has been likened to that of equal partners. The cost of the annuity contracts under consideration was paid for wholly out of community property of the decedent and his wife, Josephine U. Wilder. (Stipulation of Facts, R. 30-31.) The community property of the decedent and his wife was thus *invested* by the managing partner in these contracts. Each spouse owned a one-half interest in the contracts (under the laws of the State of Louisiana) that were so purchased with community funds.

The Circuit Court of Appeals ruled that one-half of the value of the contracts at the date of the decedent's death should be included in the taxable estate. Which one-half? Manifestly, the one-half share that belonged to the decedent, because the share of the widow was acquired at the time when the original investment in the contracts was made. The tax, then, is to be laid not upon the share of the surviving wife, but rather upon the share of the decedent. Is this justified?

In 1934-1936, the decedent purchased a life estate in the contracts in question, i.e., the right to receive the annuities during his life. He paid for this investment with funds of the community. He actually got everything that he bargained for, viz., a definite amount of money payable to him monthly so long as he should live. It was not within the contemplation of the parties to the annuity contracts that the decedent should have the right to dispose of his investment by will or to pass it under the laws of descent and distribution to his heirs-at-law; nor did he have the right to name a beneficiary of his share. On the contrary, all his rights ceased with his death. As we have said, he had nothing more or less than a life estate in the contracts.

The rights of Josephine U. Wilder, wife of the decedent, were exactly the same under the contracts as those of the decedent himself, except that the annuity payable to her was to commence in the future, viz., after the death of the decedent. There can be no question but that the decedent purchased the contracts for the *immediate* benefit of himself and wife. Mrs. Wilder is receiving at the present time the annuities under and by virtue of the contracts made in 1934-1936. Her right to the annuities exists solely by reason of the contracts. Those rights vested in her immediately upon the execution of the contracts in 1934-1936. Specifically, those rights did not come to her by reason of the death of the decedent.

The consideration passing from the decedent to the New York Life Insurance Company for the annuity contracts was his share of the community funds paid for the contracts. If we consider singly the case of any annuitant, there is an element of speculation in the issuance of an annuity contract. For how long or how short a period of time will the annuitant live? Upon the answer to this question depends the profit or loss of the annuity writer in the particular transaction; but whether it be a profit or a loss, the cost of the contract to the annuitant is in fact exhausted over the period the contract actually runs. So, in the present case, the decedent's one-half share of the community funds invested in the contracts was exhausted while the contracts were running, leaving no part of the decedent's interest in the contracts to pass to his heirs-at-law or legatees. The asset was exhausted during the life of the decedent, and nothing passed from the dead to the living when he died.

The case here is on all fours with that of a life estate in realty. It will be conceded that where a life estate exists in realty, as a result of an investment of funds of two individuals, one of whom is to take the property for life, the other the remainder, nothing should be included in the taxable estate of the life tenant for estate tax purposes. Why? Because nothing passes from the dead to the living at that time. The rights of the remainderman do not come to him by reason of the death of the life tenant, but rather by virtue of his original investment made at the time of the acquisition of the property.

So, in the present case, the decedent's widow does not get the annuity from the share in the community contracts that was owned by the decedent during his life, because his rights under such contracts—a life estate—terminated with his death. Rather is such income received by her by virtue

of the investment of *her* one-half of the community property paid for the contracts. *We thus have a case where it appears that all property rights that persist after the decedent's death arise out of an investment of the survivor's own funds made years before his death by the decedent for her.*

The principle for which we contend here has been recognized even in common law States by the Board of Tax Appeals. In the case of *Chemical Bank & Trust Company* v. *Commissioner of Internal Revenue*, 37 B. T. A. 535, the Board had before it the same question we have here, viz.: Were certain joint and survivor annuity contracts includable in the taxable estate of the decedent for estate tax purposes? The Board held that they were not so includable.

The annuity contracts in the *Chemical Bank* case appear to be identical with those in the present case. In disposing of the question before it, the Board said:

> "We shall take up and dispose of the issues in the order that we have stated them. Issue (1) relates to two annuity contracts which decedent had purchased in his lifetime from the Mutual Life Insurance Co. of New York for lump sum payments. These annuities were payable to decedent as long as he should live, and at his death if his wife survived him the annuities were payable to her as long as she should live. Decedent's wife did survive him, and respondent included in decedent's gross estate the amount which he determined to be the value, at the date of decedent's death, of the annuities which were payable to her. The annuity contracts when purchased were irrevocable. The decedent had no right to change the beneficiary and no control or interest in the contracts other than his right to receive the annuities during his life. This right ceased at his death. The interest which his wife, Mary L. Saxe, had was a right to receive the annuities after his death if she survived him. *That right she obtained absolutely at the time*

*the contracts were made. It was not a right over which the testator had any power of revocation or control during his lifetime, and at his death nothing passed from the dead to the living.* May *v.* Heiner, 281 U. S. 238; Burnet *v.* Northern Trust Co., 283 U. S. 782; Morsman *v.* Burnet, 283 U. S. 783; McCormick *v.* Burnet, 283 U. S. 784.

"These annuity contracts are different from the ones which we had before us in Guaranty Trust Company of New York, Executor, 16 B. T. A. 314. In that case the annuity contracts were revocable at the pleasure of Mrs. Roxy M. Smith, who purchased them. In our opinion in that case we point out this fact in the following language:

"' * * * The contracts had at all times a cash surrender or commuted value and the decedent could have canceled them at any time and received the amount thereof, and she could have changed the beneficiary and made it payable to whom she pleased.'

In other words, the annuity contracts were essentially equivalent to revocable trusts.

"The situation is different in the instant case. Here the annuity contracts had no cash surrender value and decedent had no power to revoke them. They were in all essential respects equivalent to irrevocable trusts and the Supreme Court decisions relating to conveyances to irrevocable trusts which we have cited above are applicable.

"We sustain petitioner's assignment of error as to issue (1)." (Italics ours.)

So, in the present case, the rights of the wife, Josephine U. Wilder, were obtained by her absolutely at the time the contracts were made. Here, as there, this was not a right over which the decedent had any power of revocation or control during his lifetime and, here as there, nothing passed from the dead to the living.

The present case was decided by the Board of Tax Appeals on authority of the case of *Charles F. Clise et al.* v.

*Commissioner of Internal Revenue,* 41 B. T. A. 820. That case involved the identical question with which we have to deal here. The Board of Tax Appeals said:

> "The Commissioner relies upon Internal Revenue Code, section 811 (c), which is the result of the amendment by the Joint Resolution of March 3, 1931, which in turn was adopted to restrict the practical effect of May *v.* Heiner, 281 U. S. 238, and Burnet *v.* Northern Trust Co., 283 U. S. 782, McCormick *v.* Burnet, 283 U. S. 784, and Morsman *v.* Burnet, 283 U. S. 783. See Hasset *v.* Welch, 303 U. S. 303. He regards Chemical Bank & Trust Co. et al., Executors, 37 B. T. A. 535, Commissioner's petition for review dismissed, C. C. A. 2d Cir., Jan. 3, 1939, as inapplicable because the annuity contract there considered was made before March 3, 1931, and hence protected from the retroactive application of the amended statute. Hasset *v.* Welch, supra.
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> "Annuity contracts such as these have never been brought by statute within the gross estate. Seymour Johnson et al., Executors, 10 B. T. A. 411. May *v.* Heiner, supra, did not consider them directly or indirectly, and the remedial resolution of March 3, 1931, did not purport to deal with them.
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> "By contracting for an annuity in consideration for a single sum the decedent was not transferring property (even though the term property be used to include money, cf. Halliburton *v.* Commissioner, 78 Fed. (2d) 265, C. C. A., 9th Cir.), of which she was retaining the possession or enjoyment of the income. She was purchasing an annuity for herself and her survivor. The property (money) which she was 'transferring' was irretrievably gone and for it she was getting a promise of an annuity, payment of which was not limited or related to income from the consideration which she paid, but was to be made at all events. It may not be regarded as income. Helvering *v.* Butterworth, 290 U. S. 365; Helvering *v.* Pardee, 290 U. S. 365; Ronald De Reuter, 7 B. T. A. 600, 607; affd., Burnet *v.* Whitehouse, 283 U. S. 148. Thus the language

of the statute either before or after the amendment, does not touch it. *It is still true under May v. Heiner, supra, that the rights of decedent's survivors are not to be regarded as attributable to the death, but to a contract made during life, and decedent did not retain for herself the possession or enjoyment of the property transferred or the income from it.*" (Italics ours.)

It was argued in the court below that Section 302 (c) of the Revenue Act of 1926 as amended established a new rule effective as to contracts made after March 3, 1931. That section as amended includes within the taxable estates of decedents, for estate tax purposes, the following described property:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Taking up the language of the section: It is not true the decedent "made a transfer, by trust or otherwise" of any property to obtain the annuity contracts, as the word "transfer" is used in this and other sections of the Act. The class of cases sought to be reached by the resolution comprises all those where it appears that the decedent made a gift or created a trust and retained for himself the income of the property for his life. But that class of cases has no

kinship with cases such as we have here. Here, there was a community partnership in which the managing partner made an *investment* of partnership funds in certain annuity contracts. For his one-half share of such funds, the managing partner purchased a definite income, which terminated with his death. In recognition of his partner's rights, he also purchased for her the same annuity as he was to have during his lifetime. There was thus, in the present case, no *transfer* within the meaning of the Resolution.

The investment of the community funds in the annuity contracts, i.e., the purchase of annuities with community funds, cannot be regarded as a *transfer,* because, had Congress intended to include transactions of this sort within the scope of the section, it could easily have said so. Instead, Congress inserted in the section an excepting clause which has a direct bearing on the present case, viz.: "Except in case of a bona fide sale for adequate and full consideration in money or money's worth." Congress thus took out of the scope of the Resolution such transactions as that involved in the present case.

The decedent actually *purchased* the contracts from the New York Life Insurance Company. Therefore, that company actually *sold* him those contracts, and no question has been raised as to the bona fides of the sale. That he received an adequate and full consideration in money or money's worth, will be apparent when we consider that with the community funds the decedent purchased annuities for his life and the life of his surviving spouse. Whether the contracts will prove profitable to the Insurance Company will depend upon the length of Mrs. Wilder's life.

**As the decedent did not possess at the time of his death any of the incidents of ownership of the annuity contracts, they are not includable in computing his taxable estate for estate tax purposes.**

This contention is based upon the analogy of the annuity contracts here involved to life insurance policies. The statute, Section 302 (g) of the Revenue Act of 1926, 44 Stats., as amended, provides for the inclusion in the gross estate of life insurance, as follows:

> "(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

It is now well settled that where the insured does not possess the usual rights of ownership of a policy of life insurance at the time of his death, no amount is to be included in the taxable estate on account of such insurance. *McElvey* v. *Commissioner of Internal Revenue*, 82 F. (2d) 395; *Commissioner of Internal Revenue* v. *Sharp*, 91 F. (2d) 804. At the time of his death, the decedent in the present case possessed none of the rights of owership in the annuity contracts, such as the right to change the beneficiary, the right to borrow on the policies, or the right to return them to the company for their cash surrender value.

In the case of the *Estate of William D. Boswell*, 37 B. T. A. 970, which was a life insurance case, the Board of Tax Appeals said:

> "The supposed justification for including the proceeds of the two insurance policies in gross estate is, according to respondent's brief, that decedent possessed 'attributes of ownership' consisting of the right to change beneficiaries, to obtain the surrender value,

and to borrow upon the security, of the policies. In each of these respects we think the conclusion must be otherwise.

"Whether or not the proceeds of these policies are to be included in the gross estate depends, regardless of the time or terms of their issuance, upon whether decedent had any interest in them at the time of his death. David A. Reed et al., Executors, 24 B. T. A. 166; Estate of John T. H. Mitchell, 27 B. T. A. 1; Chase National Bank *v.* United States, 278 U. S. 327. * * *.

"After his final designation of beneficiaries, decedent had, throughout the remainder of his life, no further power in that respect. His authority to alter the designation so made was explicitly limited 'during the lifetime of Annie M. Boswell and Helen R. Boswell (the wife and daughter), or either of them' by the requirement that 'such right is not to be exercised without their written consent'. This provision was tantamount to a surrender of control during the lifetime of decedent's wife and daughter, they being beneficiaries under the policies. David A. Reed et al., Executors, supra; Reinecke *v.* Northern Trust Co., 278 U. S. 339. Since both survived him, decedent had no such power at the time of his death. 'The decedent's death merely terminated the possible contingency of the beneficiary predeceasing the insured'. Estate of John T. H. Mitchell, supra."

The case of the *Estate of James Uriah Blacksher*, 38 B. T. A. 998, is directly in point here. We quote from the syllabus of the opinion in that case:

"1. The proceeds of life insurance policies which provided for payment to the beneficiaries after decedent's death of annuities for a period of 20 years certain and as long thereafter as the beneficiaries should live, the decedent at the time of his death having no right to change the beneficiaries, to receive the cash surrender value of the policies, or to borrow money on the policies without the consent of the beneficiaries, *held* not includable in decedent's gross estate for estate tax purposes."

We find upon reading the opinion in the cited case that the present case and the cited case are alike in several respects, among which are these:

In each case the policy was procured by and issued to the decedent by the insurance company.

In each case the decedent did not retain or possess the right to change the beneficiary.

In each case the decedent did not have the right to borrow on the policy or to surrender the policy for its cash surrender value.

In each case the right of the survivor in interest was to an annuity beginning at the death of the decedent.

In the opinion in the cited case, the Board of Tax Appeals cites and quotes from a decision of the Supreme Court in *Bingham* v. *United States,* 296 U. S. 211, and from *Ballard* v. *Helburn,* 9 Fed. Supp. 812; affirmed, 85 F. (2d) 613, as follows:

> "In Bingham *v.* United States, 296 U. S. 211, which involved the question whether the proceeds of certain life insurance policies, under facts similar to those in the instant proceeding, should be included in the gross estate, the Court said:
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> "' * * * The decedent had no power, none being reserved, to change the beneficiaries, to pledge or assign the policies after the assignment to his wife, or revoke that assignment or surrender the policies without the consent of the beneficiaries. Central Bank of Washington *v.* Hume, 128 U. S. 195, 205, 9 S. Ct. 41, 32 L. Ed. 370; Miles *v.* Connecticut Life Ins. Co., 147 U. S. 177, 181, 182, 183, 13 S. Ct. 275, 37 L. Ed. 128, compare dissent 147 U. S. 188, 13 S. Ct. 279; Commonwealth *v.* Whipple, 181 Mass. 343, 63 N. E. 919; Pingrey *v.* National Life Insurance Co., 144 Mass. 374, 382, 11 N. E. 562.'

"Also, in Ballard *v.* Helburn, 9 Fed. Supp. 812, affd. 85 F. (2d) 613, it was said:

"'* * * The policies now under discussion did not expressly nor by implication reserve to the insured the right to claim the loan or surrender values without the consent of the beneficiary, and by the overwhelming weight of the authorities he could not surrender these policies for the cash surrender value, or secure a loan on them without the consent of the beneficiary. No control of his over the proceeds and benefits of the policies was terminated by his death. His control had already been terminated by his voluntary act in irrevocably assigning two of them, and by irrevocably designating Mrs. Ballard as beneficiary in the others. Nor can it be said that any interest in the proceeds passed at his death from the insured to the beneficiary. *Her interest in the proceeds had already vested by virtue of the assignment of two of the policies and by virtue of designation as beneficiary in the others.* * * *.'

"The agreement in the policy contract was that the loans on the policy would be made by the issuing company 'in conformity with its rules then in force'. An official of the issuing company testified in this proceeding that as to the policy under consideration the consent of the beneficiary would have been required either to change the beneficiary, to obtain a loan thereon, or to surrender the policy for its cash value. In Thomas C. Boswell et al., Executors, supra, we said that 'absence of the power to change beneficiaries in itself deprives an insured of authority in his own right to obtain the surrender value', citing Levy's Estate v. Commissioner, 65 Fed. (2d) 412, and Walker *v.* United States, 83 Fed. (2d) 103." (Italics ours.)

It might seem at first blush that the fact that the decedent retained the right to demand payment of the annuities during his life would take the present case out of the rule expressed in the foregoing cases. But such is not the case. In the *Blacksher* case, the Board held:

"The Union Central Life Insurance Co. policies Nos. 328,782 and 328,783 contain substantially the same features as those of the Mutual Life Insurance Co. of New York described above, with the additional provision that the insured should have the benefit of annual dividends. *This right to dividends, however, ceased upon decedent's death and was not thereby transferred to any other person.* The retention of a life interest in the income from property transferred does not require the inclusion of the property in the transferror's estate for estate tax purposes. May *v.* Heiner, 281 U. S. 238; Tait *v.* Safe Deposit & Trust Co. of Baltimore, 74 Fed. (2d) 851; Dwight Whiting, 35 B. T. A. 100. *The right to receive the dividends was not such an interest or 'incidents of ownership' in the policies as the Court had reference to in Chase National Bank of City of New York v. United States, supra, and as is contemplated by Article 27 of Regulations 70, supra.*

"We are of the opinion that the proceeds of the above described policies, Nos. 1,176,103, 328,782, and 328,783, are not includable in decedent's gross estate." (Italics ours.)

**Conclusion.**

For these reasons, we respectfully suggest that the decision of the Board of Tax Appeals is correct, and that that of the Circuit Court of Appeals is erroneous and should be reversed upon an allowance of the writ of certiorari.

Respectfully submitted,

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